No. 96-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Does a federal district court, as a court of original jurisdiction, have jurisdiction to conduct appellate-like review of municipal administrative agency decisions, where a state-court complaint for administrative review contains some federal constitutional allegations?

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RESPONDENTS' BRIEF ON THE MERITS

Respondents, the International College of Surgeons, the United States Section of the International College of Surgeons, and Robin Construction Corporation (hereinafter the "College"), submit this brief as respondents.

STATEMENT

Except to the extent that it mischaracterizes the holding of the Seventh Circuit, the City's Statement is correct, but incomplete. In addition to the two complaints that sought judicial review of the Chicago Landmarks Commission's decision, the College also filed a Complaint for Declaratory Judgment challenging the Chicago City Council's rejection of a permit for

development under the Lake Michigan and Chicago Lakefront Protection Ordinance ("Lakefront Protection Ordinance"). *See* Pet. App. at 4a. Unlike the Landmarks Ordinance, which mandates that final decisions of the Commission be reviewed under the Illinois Administrative Review Act, 735 ILCS §§ 5/3-101 to 5/3-113 ("IARA"), the Lakefront Protection Ordinance did not provide any stated means for judicial review of City Council decisions. *Compare* J.A. 173, 175-76, Municipal Code of Chicago ("Municipal Code") §§ 2-120-810, 2-120-860 *with* Municipal Code §§ 16-4-010 *et seq.* This third case was filed in district court after that court had denied the College's motion to remand the first Complaint for Administrative Review to state court. *See* Pet. App. at 4a.

After consolidating the three cases, the district court stayed the third case pending disposition of the Complaints for Administrative Review. When the district court entered summary judgment in the City's favor on the Complaints for Administrative Review, it dismissed the third case with prejudice as moot, but with leave to reinstate if its judgment in the two administrative review cases was vacated, reversed or remanded on appeal. *See* Pet. App. at 93a. The College properly filed a notice of appeal in all three cases. Thus, when the Seventh Circuit reversed and remanded the College's administrative review cases, it also remanded the third case for "appropriate treatment." Pet. App. at 23a n.15. The declaratory judgment action is, therefore, back before the district court awaiting final resolution of this proceeding.

The City mischaracterizes the Seventh Circuit's decision. The court of appeals held that the College's Complaints for Administrative Review are not civil actions of which the district courts have original jurisdiction within the meaning of the removal statutes. *See* Pet. App. at 23a. Removal of the College's complaints is therefore barred; the Seventh Circuit remanded the complaints to the Circuit Court of Cook County, Illinois. *See id.* Even though the Seventh Circuit recognized the presence of federal constitutional claims in the College's complaints, the court expressly rejected the City's argument that

these allegations should be viewed as separate claims from the Illinois administrative review appeal. *See* Pet. App. at 22a. Indeed, the Seventh Circuit explicitly held that the College's federal constitutional claims, contained within its complaints for Illinois administrative review, do not convert the essential nature of this case—a statutory action under the Illinois Administrative Review Act—into a cause of action arising under federal law. *See id.*

SUMMARY OF ARGUMENT

This Court should reject the City's attempt to "federalize" state and local administrative appeals so as to allow the universal removal of garden-variety appeals from state or local administrative decisions. The City wrongly contends that a complaint for administrative review of a municipal agency decision may be removed to federal court so long as such a complaint contains a federal constitutional allegation, no matter how tangential.

While this Court has not decided a case in which a party has attempted to remove an on-the-record state or local administrative appeal, this Court's modern decisions make clear that an inquiry as to the standard of review to be employed by the state court is crucial in determining whether a case is removable. Drawing on this precedent, circuits that have squarely addressed the issue have held that federal district courts are without jurisdiction to conduct on-the-record appellate review of the final decisions of state or local administrative agencies.

The City's supplemental jurisdiction argument —purportedly based on the "plain language" of that statute—misses the point. The City ignores the fact that the plain language of all the jurisdictional statutes at issue presupposes the existence of a "civil action" of which the district courts have original jurisdiction. This case arises under the Municipal Code of Chicago and the IARA, which provide for judicial review of these issues. It is not by any means a civil rights action. All

the federal issues raised are inextricably intertwined with Illinois' administrative review scheme.

Finally, notions of comity and federalism militate against federal court assumption of state administrative appeals. Even if the district court properly had jurisdiction over the College's administrative appeals, it should have remanded the case to the Circuit Court of Cook County on abstention grounds. This case contains state law claims that relate to Chicago's comprehensive municipal ordinance on landmarks and implicate purely local policies—indeed, the Landmarks Ordinance, by its very nature, relates wholly to local concerns. Land use cases are matters peculiarly within the jurisdiction of states and municipalities. The instant action also presents important and unsettled questions of state law that must be decided before the federal constitutional issues are even reached. The issues of Illinois constitutional law raised by the College have never been decided by Illinois appellate courts. Moreover, Illinois courts have never had an opportunity to interpret the provisions of the Landmarks Ordinance at issue herein.

ARGUMENT

Since at least 1890, courts have inquired as to the proper "line of demarcation" between what does and does not constitute a removable suit or "civil action." *Upshur County v. Rich*, 135 U.S. 467, 472 (1890). In *Upshur*, the Court established that a proceeding before a body acting in an administrative capacity, even if that body is termed a "court," is not removable. *Id.* at 477. The Court later decided that administrative review cases that seek trials *de novo* in the state district or circuit court are removable. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-55 (1961); *Chicago, Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 578-79 (1954). The Court has not had the opportunity to decide the precise question presented in this case: whether a state administrative appeal that seeks on-the-record, deferential review of a municipal agency determination can be properly removed. This Court should side with the weight of

modern precedent and well-settled notions of federalism and hold that such an action cannot be removed.

I. FEDERAL DISTRICT COURTS DO NOT HAVE JURISDICTION TO CONDUCT APPELLATE REVIEW OF STATE AGENCY DECISIONS.

A. Courts Must Determine The Nature Of Review To Be Applied In State Court.

The Seventh Circuit correctly concluded that the College's Complaints for Administrative Review, which were statutory appeals from municipal administrative decisions filed under the IARA, did not constitute "civil actions" within the district court's "original jurisdiction" under 28 U.S.C. § 1441(a). The Seventh Circuit properly recognized, under the great weight of authority on point, that in deciding whether a complaint for administrative review is removable, a court must focus on the nature of the state judicial action and the standard of review to be applied by state courts.

Crucial to the Seventh Circuit's opinion were the Court's decisions in *Stude* and *Horton*. The Court stated in *Stude* and implied in *Horton* that federal district courts, as courts of original jurisdiction, cannot review on appeal findings of state agencies. *See Stude*, 346 U.S. at 581; *Horton*, 367 U.S. at 354-55. The City's selective application of *Stude* and *Horton* is devoid of merit.

In *Stude*, the railroad, pursuant to Iowa law, condemned certain land. 346 U.S. at 575-76. It appealed the local sheriff's award of compensation to the federal district court, invoking diversity of citizenship and seeking to limit the award. *Id.* at 577. The Court sustained dismissal of the action:

> The United States District Court . . . does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state "legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal. . . ." The Iowa

> Code does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure make no such provision.

Stude, 346 U.S. at 581 (quoting *Burford v. Sun Oil*, 319 U.S. 315, 317 (1943)); *see also Department of Transp. & Devel. v. Beaird-Poulan, Inc.*, 449 U.S. 971, 973-74 (1980) (Rehnquist, J., dissenting from denial of certiorari).

The railroad also had sought review of the sheriff's decision by way of a second action in state court. *See Stude*, 346 U.S. at 577. Under Iowa administrative procedure, the railroad, as the party aggrieved by agency action, was entitled to a trial *de novo* in state court by filing a notice of appeal from the agency's action. *See id.* After filing its appeal in state court, the railroad attempted to remove the case to federal court. *See id.* The Court ultimately found that removal was improper because the railroad, as plaintiff in the case, could not remove, noting that "the proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county." *Id.* at 578. However, the Court stated that once "the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court." *Id.* at 578-79.

The Court did not suggest in *Stude*, as the City seems to intimate (*see* Pet. Br. at 38 & n.23), that all agency action becomes a "civil action" upon its arrival for review in state court. Rather, the Court examined the nature of the state judicial proceeding at issue. The case removed from state court to the district court in *Stude* was a *de novo* proceeding "'tried [by the state court] as an action by ordinary proceedings.'" *Id.* at 576 (quoting Iowa Code § 472.21 (1950)).

In *Horton*, the Court held that a challenge to a Texas administrative determination on a worker's compensation claim could be filed in federal court as a "civil action" on grounds of diversity, but only because Texas law provided that such a

challenge "*is not an appellate proceeding*. . . . It is a trial *de novo* wholly without reference to what may have been decided by the [Texas Industrial Accident] Board." 367 U.S. at 354-55 (emphasis added). Again, the City effectively glosses over the Court's critical examination of the standard of review to be applied in the state proceeding.

The clear import of *Stude* and *Horton* is that, in deciding whether a complaint for administrative review is removable, a court must focus on the nature of the state judicial action. Rather than properly recognizing the teaching of these cases, the City relies on a host of opinions from the nineteenth and early twentieth century in which federal courts reviewed administrative decisions of state or local agencies. Pet. Br. at 33. The Court, in the nineteenth century, defined "civil action" (or the predecessor term "suit") broadly. *See, e.g., Upshur*, 135 U.S. at 475. The value of this early precedent, however, has been called seriously into question:

> [T]he proper application in the modern context of the 19th-Century Court precedent defining "civil action" is a matter not free from doubt. Those Courts could not possibly have envisioned the rise of populism, the demise of economic due process, and ultimately the advent of the New Deal, all of which radically changed economic life and governance in this society. Mirroring the federal model produced by the New Deal, a multitude of administrative agencies now permeate the ranks of state decisionmaking. In that context, we think it a legitimate question to wonder whether the Supreme Court and/or the Congress believe it appropriate to define expansively the term "civil action" so as to allow the universal removal of garden-variety appeals from state administrative action.

Greenberg v. Veteran, 710 F. Supp. 962, 971 n.8. (S.D.N.Y.), *rev'd on other grounds*, 889 F.2d 418 (2d Cir. 1989).[1]

[1] *Greenberg* involved the propriety of removal of a New York "Article 78" proceeding. 710 F. Supp. at 964. The district court

Most importantly, however, these early decisions are of dubious value in light of *Stude*, *Horton*, and their progeny because they do not address the standard of review to be employed in the state appeal. Indeed, drawing on *Stude* and *Horton*, the three most recent circuits squarely addressing the issue (including the court below) have held that federal district courts are without jurisdiction to conduct on-the-record appellate review of the findings of state or local administrative agencies. Forty pages into its brief on the merits, the City buries in a footnote the fact that, prior to the Seventh Circuit's decision in this case, both the Fourth Circuit and the First Circuit Courts of Appeal had held that an action seeking review of a state administrative agency's decision is not removable where state law provides for deferential review in state court of such a decision. Pet. Br. at 39 n.24; *see Fairfax County Redevelopment & Housing Auth. v. W.M. Schlosser Co.*, 64 F.3d 155, 158 (4th Cir. 1995); *Armistead v. C & M Transp., Inc.*, 49 F.3d 43, 47-48 & n.4 (1st Cir. 1995).

W.M. Schlosser concerned a contract dispute between W.M. Schlosser Co. and Fairfax County, Virginia. Schlosser brought a state administrative action against the County for failure to pay the full amount due under a construction contract. *See W.M. Schlosser*, 64 F.3d at 156. The administrative agency ruled in favor of Schlosser and ordered the County to pay the deficiency. *See id.* The County appealed the decision to a Virginia circuit court, pursuant to Virginia Code § 11-71. *See id.* Schlosser removed the appeal to federal court, alleging diversity jurisdiction. *See id.* Section 11-71 provided that, in reviewing administrative proceedings, "findings of fact shall be final and

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addressed removal under the little-used "refusal clause" of the civil rights removal statute, 28 U.S.C. § 1443(2), as well as under the general removal statute. *See id.* at 966-72. The court held that, even assuming such a case was removable, the case should be remanded on abstention grounds. *See id.* at 973-76. The Second Circuit reversed, addressing only the propriety of removal under the refusal clause, and holding such a case removable under that provision. *See Greenberg v. Veteran*, 889 F.2d 418, 422 (2d Cir. 1989).

conclusive and shall not be set aside unless the same are fraudulent or arbitrary and capricious." Va. Code Ann. § 11-71. The Fourth Circuit properly understood *Stude* and *Horton* to bar removal because there is no "civil action" when the reviewing court is required to give deference to state administrative proceedings. *W.M. Schlosser*, 64 F.3d at 158. In discussing its holding, the Fourth Circuit noted that "the district court is a court of original jurisdiction, not an appellate tribunal." *Id.*

Armistead involved an appeal from an award issued by Maine's Workers' Compensation Commission. *See Armistead*, 49 F.3d at 45. Removal to federal court there was "doubly barred" under 28 U.S.C. § 1445(c) (barring removal of state workers' compensation disputes) and because the appeal did not constitute a "civil action." *Id.* at 46. The First Circuit found that the "limited . . . appellate authority exercised by Maine courts over Commission proceedings" was inconsistent with the district courts' role as courts of original jurisdiction. *Id.* at 47 (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923)).[2]

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[2] The Seventh Circuit's opinion correctly emphasizes that numerous other courts, including the First, Second, Fourth, Fifth, Ninth and Tenth Circuits, have concluded, in various procedural contexts, that district courts are without jurisdiction to review on appeal the findings of state agencies. *See* Pet. App. at 15a n.10; *see, e.g., Labiche v. Louisiana Patients' Comp. Fund Oversight Bd.*, 69 F.3d 21, 22 (5th Cir. 1995) (per curiam) ("We have reviewed [the statutes fixing the jurisdiction of the federal courts] and none would authorize appellate review by a United States District Court of any actions taken by a state agency."); *Armistead*, 49 F.3d at 47-48 & n.4; *W.M. Schlosser*, 64 F.3d at 157-58 (collecting cases); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992) ("This Court lacks jurisdiction to hear [appellant's] claim that the [state agency's] substantive decision was arbitrary and capricious."); *Shell Oil Co. v. Train*, 585 F.2d 409, 414-15 (9th Cir. 1978) (holding that federal district court was without jurisdiction to review state agency denial of environmental permit); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972) ("To the extent that the federal district court would treat a case removed from the [state court] as a review of a[] [state] administrative decision by giving deference to the [agency's] determination . . . , this would place a federal court in an improper

Several district courts are in accord with the holdings and reasoning employed in *Armistead* and *W.M. Schlosser*. *See, e.g.*, *Matherly v. Las Vegas Valley Water Dist.*, 926 F. Supp. 990, 993-94 (D. Nev. 1996) (holding that appeal taken from an agency determination that affords only limited review of agency determination is not a removable civil action); *Greenberg*, 710 F. Supp. at 971 ("[I]t is beyond cavil that a statutory appeal of administrative state action, whether or not it involves diverse parties or a federal question, may not be filed in federal court. Following from that principle, we doubt that Congress intended the term 'civil action' under the removal statute to be so sponge-like as to allow its absorption of every conceivable type of proceeding involving appeal from state or municipal administrative action which touches upon a federal question. To believe otherwise is to suggest that Congress was ignorant of notions of comity and federalism that are such an important part of our constitutional and jurisprudential fabric.") (citation omitted); *Crivello v. Board of Adjustment*, 183 F. Supp. 826, 828 (D.N.J. 1960) (holding that deferential review of state administrative action, although nominally designated a "civil action at law," did not constitute a "civil action" under the removal statute within the court's "original jurisdiction"); *Collins v. Public Serv. Comm'n*, 129 F. Supp. 722 (W.D. Mo. 1955) (noting "doubts as to whether [a petition to review an order of state agency] constitutes a 'civil action'" and holding that such a proceeding is not "one of which the district courts of the United States have original jurisdiction within the meaning of the removal act").

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posture vis-a-vis a non-federal agency."); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) ("[T]he United States District Court had no power to consider an appeal from the state administrative tribunal. Such a proceeding is not within its statutory jurisdiction."); *cf. Frison v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) (noting that the district court should have declined pendent jurisdiction over state law claim because "it is essentially a petition for judicial review of state administrative action rather than a distinct claim for relief").

Rather than recognize this authority, the City instead relies on the Eighth Circuit's opinion in *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957). Pet. Br. at 38-39. The Seventh Circuit's opinion in this case makes clear that it was fully cognizant of *Range Oil*, but chose, as did the Fourth Circuit in *W.M. Schlosser*, not to follow its faulty reasoning. *See* Pet. App. at 15a-16a n.10; *W.M. Schlosser*, 64 F.3d at 158. Indeed, contrary to the City's assertions, *Range Oil* is an anomaly. In fact, as emphasized in *W.M. Schlosser*, *Range Oil* failed to follow this Court's decisions in *Stude* and *Horton*. *See W.M. Schlosser*, 64 F.3d at 158.

It is a fundamental principle of statutory construction that courts must give effect to every clause and word of a statute. *See Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997). In interpreting the predecessor to 28 U.S.C. § 1331, the Court has emphasized: "The jurisdiction possessed by the District Courts is *strictly original*." *Rooker*, 263 U.S. at 416 (emphasis added). The City's position—and its heavy reliance on *Range Oil*—renders the words "original jurisdiction" in the pertinent jurisdictional statutes completely superfluous.

As the Seventh Circuit emphasized, the court in *Range Oil* failed to consider that the diversity statute vests only "original" and not "appellate" jurisdiction in the district courts. Pet. App. at 15a-16a n.10; *see also Stude*, 346 U.S. at 581; *Burford*, 319 U.S. at 317; *W.M. Schlosser*, 64 F.3d at 158. The Seventh Circuit correctly concluded: "The *Range Oil* court equates 'original jurisdiction' with the prerequisites of diversity jurisdiction, rendering the former requirement meaningless." Pet. App. at 15a-16a n.10.

B. Federal Administrative Law Principles Do Not Apply To This Illinois Administrative Review Case. Sound Policy Reasons Mandate That District Courts Decline To Hear State Administrative Appeals.

The City, by asserting that the holding below cannot be reconciled with federal question jurisdiction over actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, because district courts provide deferential review of federal agency action, effectively ignores the broad policy favoring judicial review under the APA and dismisses well-settled notions of comity and federalism. Quite simply, the APA "is of course not applicable to state administrative agencies." *Beaird-Poulan*, 449 U.S. at 973. Nor should the broad policies favoring judicial review of federal agency action, subject only to statutory limitations,[3] apply to federal district court review of state or local agency action, allowing wholesale removal of state administrative appeals.

That district courts give deference to federal agency findings in non-statutory review actions does not warrant the conclusion that district courts are competent to provide such review of state or municipal agency decisions. Indeed, courts do

[3] *See Califano v. Sanders*, 430 U.S. 99 (1977). In *Califano*, the Court held that the APA is not an implied grant of subject matter jurisdiction to review agency actions. *Id.* at 104. The Court emphasized, however, that the APA "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Id.* So-called non-statutory review under the APA, then, in keeping with this broad policy, provides a stopgap mode of review when federal administrative action is judicially reviewable but no statute specifies the route by which to obtain review. *See, e.g., United States v. Fausto*, 484 U.S. 439, 444 (1988); *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985). In light of this policy, the Court has emphasized that the APA's "generous review provisions" must be given a "hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). The justifications for federal review of federal agency action do not exist in the context of state administrative agencies because, like here, state law prescribes the procedures for judicial review.

not find that these roles are irreconcilable. In *Hameetman*, for example, the Seventh Circuit characterized a non-statutory review action as a suit resembling "an equity suit but . . . actually a review proceeding rather than an original proceeding," while at the same time recognizing that "[f]ederal courts have no general appellate authority over state courts or state agencies." *Hameetman*, 776 F.2d at 640. Thus, while the court found that a district court properly could hear a section 1983 challenge to state administrative action and grant injunctive relief against violations of federal law, the court emphasized that a federal judge has no power to "remand" a case to a state agency, as it could in the federal context. *Id.*[4] Indeed, leading commentators note that federal courts may sometimes review state agency action, "*but the review is for the limited purpose of determining whether that action did indeed violate federal law.*" 3 Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 18.7 at 197 (3d ed. 1994) (emphasis added).

If the City's position were adopted, the federal district courts would be required to provide "non-statutory review" of every state administrative decision where a federal constitutional issue was raised.[5] This is a wholly inappropriate allocation of federal and state judicial resources—something the federal APA itself was designed to eliminate with respect to federal administrative review,[6] and not contemplated by Congress or the Court in *Califano*.

[4] The College's prayers for relief in their Complaints for Administrative Review asked for "reversal" of the decisions of the Landmarks Commission (*see* J.A. at 35, 79)—relief that the federal district court could not possibly provide.

[5] The *Amici Curiae* National Trust for Historic Preservation, National Alliance of Preservation Commissions, and Landmarks Preservation Council of Illinois ("National Trust *Amici*") argue that practically every historic preservation case involves federal constitutional law and, therefore, only federal courts are equipped to resolve such cases. *See* National Trust *Amici* Br. at 10-11. If this argument is accepted, then every landmarks commission decision and zoning board decision soon will find its way into federal court.

[6] The legislative history of the APA illustrates that one goal

While under the *Erie* doctrine federal courts ascertain and apply state law, *see Salve Regina College v. Russell*, 499 U.S. 225, 238-39 (1991), federal court determination of the state law validity of state administrative action is qualitatively different. At a minimum, federal courts would be required to grapple with all manners of complex state regulations and state agency decisions—which state courts are better equipped to review. Take, for example, the wide variety of approaches taken by the states with respect to judicial review regarding questions of law alone:

> First there are those states that give extreme deference to agency actions. The states in this category seem to have adopted, either explicitly or implicitly, a straight reading of *Chevron* [*U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)], and afford great weight to agency determinations. At the other end of the spectrum are those states that grant no deference to agency action. . . . The third, and largest, group consists of states that vary the level of deference to agency action with the type of problem decided by the agency. A fourth group has no set rules as to the scope of judicial review on questions of law.

William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 763-73 (1991). In light of this array of standards to be applied, the City is incorrect when it argues that no policy reasons exist for treating state and

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Congress sought to achieve through the Act was a measure of uniformity in federal administrative procedures. H.R. Rep. No. 1980 (1946), *reprinted in* 1946 U.S.C.C.S. 1195, 1203-04. The Act sets forth detailed procedures for agency rulemakings, adjudications, hearings, and judicial review. *See* 5 U.S.C. §§ 701-706. With the institution of the Act, and the ensuing fifty years the federal courts have had to refine their review of federal agency actions, the federal courts are (presumably) now very capable in this area. This uniformity of procedure and first hand experience, however, does not exist with respect to federal review of state agency actions.

local agency decisions differently than federal agency decisions. *See* Pet. Br. at 11-12.[7]

II. SUPPLEMENTAL JURISDICTION PRINCIPLES DO NOT APPLY TO THIS CASE BECAUSE THE COLLEGE'S COMPLAINTS FOR ADMINISTRATIVE REVIEW DO NOT ARISE UNDER FEDERAL LAW.

The City argues at length that this appeal may be rather easily resolved by applying the well-settled principles of supplemental jurisdiction. *See, e.g.*, Pet. Br. at 10 ("The plain language of the supplemental jurisdiction statute makes clear that state-law claims may be heard in federal court under the district court's 'supplemental jurisdiction' as long as they are part of the same case or controversy."); *see also* Pet. Br. at 12, 14-15. Although the City offers an interesting exposition of the doctrine of pendent jurisdiction and its codification as supplemental jurisdiction under 28 U.S.C. § 1367, the City's entire discussion on this topic completely misses the point of this case.

A. The College's Complaints Arise Under Illinois Law.

The issue before the Court has absolutely nothing to do with pendent state claims arising out of a federal claim's common nucleus of operative facts. Instead, the critical question of the instant case asks whether the College's Complaints for Administrative Review under the IARA constitute a civil action of which the district courts of the United States have original jurisdiction.

Indeed, any discussion of supplemental jurisdiction necessarily presumes the existence of a "civil action." The plain language of 28 U.S.C. § 1367 provides:

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[7] In any event, should this Court decide that the opinion below somehow conflicts with *Califano*, the different state views on scope of review—as well as the vast differences in the organic laws, regulations and decisions of the large number of state administrative agencies—would present a morass of issues of statutory interpretation that would require abstention. *See infra* Part III.

> *[I]n any civil action of which the district courts have original jurisdiction*, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (emphasis added). The italicized phrase demonstrates that supplemental jurisdiction presumes that the case in question already falls within the original jurisdiction of the district courts. Such a presumption is inappropriate and, indeed, nonsensical in the case at bar. This case presumes nothing. It asks the more fundamental question whether the College's Complaints for Administrative Review even fall within the federal courts' original jurisdiction.

Under 28 U.S.C. § 1441, removal of a state complaint to federal court is proper where "the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). In this case, because diversity of citizenship is not alleged, the propriety of removal "turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

The propriety of removal, then, is tied to the original jurisdiction of the district courts; removal is proper only if the action originally could have been brought in federal court. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). If original jurisdiction is based upon the existence of a federal question, the complaint must "arise under" federal law. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983). Whether the complaint "arise[s] under" federal law can be determined only by reference to the "well-pleaded complaint." Under the "well-pleaded complaint" doctrine, federal law must create the cause of action or some substantial, disputed question of federal law must be an element of the plaintiff's claim. *See id.* at 27-28. The Court repeatedly has held that, in order for a claim to "arise under" the Constitution, law or treaties

of the United States, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (per curiam) (citations omitted).

In *Franchise Tax Board*, the Court observed that there is no "single, precise definition" of federal question jurisdiction; rather, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." 463 U.S. at 8. Sixty-seven years earlier, Justice Holmes determined that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). The Court agreed in *Merrell Dow*: "The vast majority of cases brought under the general federal-question jurisdiction of federal courts are those in which the federal law creates the cause of action." 478 U.S. at 808.

The City asserts that the College's complaints "arise under" federal law solely because those complaints contain allegations that the Landmarks Commission violated the United States Constitution. The City states rather conclusively that "[t]he federal constitutional claims alleged in the administrative review complaints arose under federal law." Pet. Br. at 19. Yet recent precedent from the Court makes clear that federal question analysis—whether the College's complaints do or do not arise under federal law—cannot be analyzed so cursorily. *Merrell Dow* declared that even though the meaning of the term "arising under" may seem to extend to all cases that contain some federal allegation, the Court "has long construed the statutory grant of federal question jurisdiction as conferring a more limited power." 478 U.S. at 807.

The City cites *Franchise Tax Board* to distance this case from Justice Holmes' construction of federal question jurisdiction and to support its reasoning that the mere presence of federal allegations in the College's complaints satisfies the Court's "arising under" analysis. That reasoning, however, misstates the

law. *Merrell Dow*, which was decided three years after *Franchise Tax Board*, made clear that jurisdictional statements from *Franchise Tax Board* upon which the City relies must be read with caution: "*Franchise Tax Board* . . . did not purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 809, 813.[8] Indeed, *Merrell Dow* explicitly eschews the City's interpretation of *Franchise Tax Board* and the superficial federal-question analysis in which the City engages: "Far from creating some kind of automatic test [for determining federal question jurisdiction], *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction." *Id.* at 814.

The instant case, then, poses the same issue that was addressed in *Merrell Dow*: "Whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action . . . ." *Id.* at 810. To analyze the basis for jurisdiction here, the Court must engage, as both *Franchise Tax Board* and *Merrell Dow* suggest, in "principled, pragmatic distinctions" regarding the source of law that gave rise to the College's complaints, "a selective process which picks the substantial causes out of the

[8] The City states, "In *Franchise Tax Board*, the Court wrote that it has 'often held that a case arose under federal law where the vindication of a right under state law necessarily turned on some construction of federal law.'" Pet. Br. at 21-22 (quoting *Franchise Tax Bd.*, 463 U.S. at 9). With this support, the City concludes that the College's complaints, even though framed as a state administrative review action, still arise under federal law. *See* Pet. Br. at 23. *Merrell Dow*, however, instructs otherwise. Addressing the exact same language upon which the City relies, the Court in *Merrell Dow* writes: "Our actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982 ed.), but we nevertheless concluded that federal jurisdiction was lacking." 478 U.S. at 809. Regardless, then, of its arguments to the contrary, *Franchise Tax Board* offers the City little support.

web and lays the other ones aside." *Merrell Dow*, 478 U.S. at 813-14 (quoting *Franchise Tax Bd.*, 463 U.S. at 20-21).

Both of the College's Complaints for Administrative Review arise under Illinois—not federal—law. Indeed, the IARA provides "the exclusive method by which an aggrieved party may obtain judicial review of decisions made by certain administrative agencies in Illinois," including the Chicago Landmarks Commission. Pet. App. at 16a. As the Seventh Circuit determined, the IARA provides for judicial review of final decisions of those administrative agencies whose enabling legislation adopts, by express reference, the provisions of the IARA. *See* Pet. App. at 16a. The Landmarks Ordinance expressly provides that "final administrative decision[s] [are] appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act." J.A. 173, 175-76, Municipal Code §§ 2-120-810, 2-120-860; *see also* Pet. App. at 6a nn.5 & 6.

Furthermore, Illinois law is quite specific regarding the functions the courts may perform in reviewing an administrative decision: the circuit court may stay an administrative decision; order the agency to amend, complete, or file the record of the administrative proceeding; substitute, dismiss, or realign parties; affirm or reverse the agency's decision in whole or in part; remand the decision with proper instructions; or enter money judgments where appropriate. *See* 735 ILCS § 5/3-111. Moreover, as the Seventh Circuit noted, Illinois courts have construed strictly section 3-111 and have limited reviewing courts to exercising only those enumerated powers. *See* Pet. App. at 16a n.11 (collecting Illinois cases).

In addition, Illinois courts reviewing agency action under the IARA have the authority to rule on constitutional issues. *See* 735 ILCS § 5/3-110. As the Seventh Circuit expressly noted, the fundamental validity of the ordinance upon which the court proceeding is based may be challenged in a state suit for administrative review. *See Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1976); *Howard v. Lawton*, 175 N.E.2d 556,

557 (Ill. 1961); *Murray v. Board of Review of Peoria County*, 604 N.E.2d 1040, 1043 (Ill. App. Ct. 1992). "'To hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision.'" Pet. App. at 17a (quoting *Howard*, 175 N.E.2d at 557).

This review of the Illinois law that gave rise to the College's Complaints for Administrative Review demonstrates that the instant case does not, as the City maintains, "arise under" federal law. Thus, the City's entire discussion of supplemental jurisdiction is a diversion. The City attempts to characterize the College's complaints as a claim for appellate-like administrative review coupled with removable federal questions. This view was squarely rejected by the Seventh Circuit and should be rejected here. *See* Pet. App. at 22a n.14 ("We cannot accept, therefore, the submission that, because the College's complaints contain several challenges to the Chicago Landmark Ordinance arising under the federal constitution, the district court's jurisdiction in this case may be premised on 28 U.S.C. § 1331, the federal question statute."). While the College's Complaints for Administrative Review contain federal constitutional allegations, those allegations are inextricably intertwined with matters grounded in state law and limited to the administrative record under the IARA. As the Fourth Circuit has recognized in the context of zoning and land use cases:

> Virtually all of these cases, when stripped of the cloak of their federal constitutional claims, are state law cases. The federal claims are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims.

Pomponio v. Fauquier County Bd., 21 F.3d 1319, 1326 (4th Cir. 1994), *cert. denied*, 513 U.S. 870 (1994).

The Fourth Circuit's logic in *Pomponio* comports with the Seventh Circuit's reasoning in the instant case. *See* Pet. App. at

17a. Put simply, the College's Complaints for Administrative Review are state-law cases. The federal constitutional issues that the City attempts to isolate in order to assert federal jurisdiction do not convert the essential nature of this case—a statutory complaint under the IARA—into a federal question cause of action simply because it alleges some federal constitutional challenges to the Landmarks Commission's final decision.

B. The College's Complaints For Administrative Review Are Not Civil Rights Actions. The "Well-Pleaded Complaint" Doctrine Permits The College To Choose State Court Jurisdiction.

The City attempts to persuade the Court that the College's complaints present two causes of action, one federal and one state, both of which can be heard in federal court. *See* Pet. Br. at 26 ("[A]ll of [the College's] claims fall within federal jurisdiction—the federal claims within original jurisdiction and the state claims within supplemental jurisdiction.").[9] The City tries to persuade this Court that the College's Complaints for Administrative Review are no different than civil rights actions. Of course, the City never actually states, at least in the brief it submitted to this Court, that it sees the College's complaints as

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[9] The City apparently focuses on Judge Ripple's statement that the College's federal claims, "if brought alone, would be removable to federal court." Pet. App. at 20a; *see also* Pet. Br. at 13, 24. But rather than supporting the City's argument for federal jurisdiction, Judge Ripple's counter-factual statement underscores the particular state-based nature of the College's complaints. Judge Ripple, writing for the Seventh Circuit, specifically noted that the College's Complaints for Administrative Review, *including the federal claims alleged therein*, arose from the state statutory procedure for administrative review: "Illinois' administrative review procedure scheme permits an attack on the facial validity of the statute; such an attack can be brought independently of the administrative action or it may also be brought—*as it was here*—in the action for judicial review under the IARA." Pet. App. at 19a (emphasis added).

civil rights actions.[10] Nevertheless, the City's reliance on civil rights reasoning is obvious and, more importantly, misplaced. The College's complaints are simply not civil rights actions; the College has not fashioned its claims as a suit under 42 U.S.C. § 1983. Because the IARA provides Illinois courts the authority to resolve constitutional issues in the context of on-the-record administrative review, this distinction is crucial. *See* Pet. App. at 17a.

By now it is axiomatic that Congress passed section 1983 as a means to enforce in federal court the provisions of the Fourteenth Amendment. *Monroe v. Pape*, 365 U.S. 167, 171 (1961). The aim of Congress was unmistakable: "[Section 1983] provide[s] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. *Monroe* makes clear that section 1983 "gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the [f]ederal courts." *Id.* at 178; *see also Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992) ("[Section 1983] provides the citizen with an effective remedy against those abuses of state power that violate federal law. . . ."); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) ("Title 42 U.S.C. § 1983 provides a remedy for

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[10] The City was more straightforward regarding its reliance on the logic of civil rights cases when it originally asserted the existence of federal jurisdiction over the College's complaints. *See* J.A. 11, Notice of Removal, United States District Court, No. 91 C 1587. There the City argued:

> This Court has original jurisdiction to hear suits to redress violations of rights guaranteed by the United States Constitution pursuant to 28 U.S.C. sections 1331 and 1343. Petition[ers] are entitled to remove this action pursuant to the provisions of 28 U.S.C. section 1441(b), *in that it appears from the face of plaintiffs' complaint that this is a civil rights complaint which arises under the United States Constitution, and the matter involves a federal question.*

Id. at 14-15 (emphasis added).

deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place 'under color of any statute, ordinance, regulation, custom, or usage, of any State. . . .'") (quoting 42 U.S.C. § 1983).

Moreover, in *Monell v. New York City Department of Social Services*, the Court held that Congress intended municipalities and other local governmental entities to be included among those persons to whom section 1983 applies. 436 U.S. 658, 690 (1978). At the same time, the Court made clear that municipalities and other local governmental entities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

These basic principles of section 1983 suggest that the College might have brought a section 1983 action. The College deliberately chose, however, to seek judicial review of the Landmarks Commission's final decisions in state court pursuant to Chicago's Municipal Code and the IARA. The "well-pleaded complaint" doctrine permits the College to make this choice. This doctrine allows a plaintiff to avoid removal by tailoring his or her complaint to exclude certain claims. *See Caterpillar Inc.*, 482 U.S. at 399 ("[T]he plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court."); *Merrell Dow*, 478 U.S. at 804 n.6 ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) ("[T]he plaintiff is absolute master of what jurisdiction he will appeal to. . . ."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon. . . ."). The "well-pleaded complaint" doctrine supports the College's decision to avail itself only of its state-based right to administrative review.

The City's mistaken dependence upon civil rights principles is exemplified by its reliance on *Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481 (11th Cir. 1996), and *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91 (1st Cir. 1977). *See* Pet. Br. at 16. The City introduces these

cases with the broad and, frankly, indefensible statement that "federal courts have universally held that there is federal jurisdiction over suits containing federal and state claims, including state-law challenges to the land-use decisions of local administrative agencies." Pet. Br. at 16. *Bickerstaff* and *Ortega Cabrera* are cited, then, for the proposition that supplemental jurisdiction is proper in local land-use cases where federal questions are also raised.[11]

Neither *Bickerstaff* nor *Ortega Cabrera* can fairly be characterized as arising under state administrative law. The crucial and fatal distinction between the College's Complaints for Administrative Review and *Bickerstaff* and *Ortega Cabrera* is that the latter cases were section 1983 actions, and this case was not. The Seventh Circuit explicitly noted that a section 1983 claim, if such a claim were included in the College's complaints, "is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record." Pet. App. at 20a; *see also Hameetman*, 776 F.2d at 640 ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action even if the plaintiff is complaining about a denial of due process in the proceedings before the agency or the court and is asking the federal court to enjoin the action."); *Stratton v. Wenona Community Unit Dist. No. 1*, 551 N.E.2d 640, 646 (Ill. 1990) ("[A] section 1983 action is not a review proceeding even when, as here, it challenges administrative action that has an adjudicative component."). Thus, an action under section 1983 and a suit for administrative review are completely different. Jurisdictional arguments based on section 1983 cases are simply out of place because the College's complaints arise under Illinois administrative review law.

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[11] The quoted language above cannot legitimately be described as the "holding" of either case, nor does it appear that the precise issue presented in this case was ever before the courts in *Bickerstaff* or *Ortega Cabrera*. Indeed, the City fails to cite a single case in which a federal court specifically assumed pendent or supplemental jurisdiction over an on-the-record state administrative appeal.

The City attempts to avoid the force of this argument by suggesting that the fundamental state-based nature of the College's claims—that is, that its Complaints for Administrative Review arise from Illinois' administrative scheme—is nothing more than artful pleading. *See* Pet. Br. at 20. The City urges this Court to "determine the real nature" of the College's complaints, regardless of how those complaints may be characterized. *See* Pet. Br. at 20 (quoting *Federated Dep't Stores, Inc. v. Mointie*, 452 U.S. 394, 397 n.2 (1981)).

The issue of federal question jurisdiction was not central to the *Federated Department Stores* decision. On the contrary, the entire discussion of jurisdiction on which the City relies is relegated to a single footnote in a seventeen page opinion. *See Federated Department Stores*, 452 U.S. at 397 n.2. Indeed, the opening line of the Court's opinion reads: "The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata." *Id.* at 395.

The procedural posture of *Federated Department Stores* further undermines the relevance of that opinion. In that case, the plaintiffs first filed a federal action that was dismissed on its merits. *See id.* at 396. The plaintiffs chose not to appeal. *See id.* Subsequently the plaintiffs filed the identical action in state court. *See id.* "After an extensive review and analysis of the origins and substance" of the federal and state complaints, both the district court and the Ninth Circuit found that, given the identical nature of the plaintiffs' state claims to the previously dismissed federal claims, removal was proper. *Id.* at 396, 397 n.2. This procedural history illustrates why the Court was willing to uphold the essential federal nature of the plaintiffs' claims in *Federated Department Stores*. There the plaintiffs slyly sought to avoid the consequences of dismissal of their previous action.

No such subterfuge exists in the case at bar. On the contrary, the College has simply sought review of the administrative determinations of the Chicago Landmarks Commission as it was instructed to do by the very municipal

code that authorized the Commission's action. *See* J.A. 173, 175-76, Municipal Code §§ 2-120-810, 2-120-860 ("[The] final administrative decision[s] [are] appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act. . . ."); *see also* Pet. App. at 6a, nn.5 & 6. Despite this clear direction, the City would have this Court hold that this is essentially a federal cause of action. As discussed above, the "well-pleaded complaint" doctrine permits the College to "choose to have the cause heard in state court." *Caterpillar Inc.*, 482 U.S. at 399. Neither *Federated Department Stores* nor the undisputed history of this case indicates that the College has illegitimately avoided federal jurisdiction.

There can be no doubt that the College's complaints arose under the applicable state administrative review law. The College has not sought to avail itself of the civil rights statutes. The City's entire discussion of supplemental jurisdiction, then, is irrelevant because it is based on the erroneous premise that these were civil rights complaints. As discussed above, the mere presence of allegations of federal constitutional violations in its Complaints for Administrative Review does not transform the College's suit into an action arising under federal law. *See Merrell Dow*, 478 U.S. at 813.

C. The Logic Of *Frances J. v. Wright* Supports The Seventh Circuit's Holding That The Nature Of The College's Suit Precludes Federal Jurisdiction.

Equally unconvincing is the City's criticism of the Seventh Circuit's reliance on *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994). The Seventh Circuit followed the reasoning of *Frances J.* to support the conclusion that the College's complaints, lacking the essential ingredients of a "civil action," should not be heard in federal court. *See* Pet. App. at 20a. The City stresses the obvious distinctions between *Frances J.* and the instant appeal to suggest that the Seventh Circuit analogy constitutes error. *See* Pet. Br. at 40-42. Nothing could be further from the truth. The City simply mischaracterizes the opinion below.

The Seventh Circuit explicitly recognized that *Frances J.* and the instant appeal presented different legal issues; Judge Ripple merely found the reasoning of *Frances J.* instructive. *See* Pet. App. at 22a ("Although the situation presented here is not identical in all respects to the situation presented in *Frances J.*, the basic reasoning of that case is applicable."). In *Frances J.*, the court was confronted with an attempt to remove a complaint that contained some claims barred by the Eleventh Amendment and the doctrine of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), along with other claims that were removable pursuant to 28 U.S.C. § 1441(a). The court concluded that the Eleventh Amendment barred the action from removal under either section 1441(a) or 1441(c). "By the plain meaning of section 1441(a), an action that contains claims barred by sovereign immunity, cannot, in whole or in part, be removed from the state courts to a federal forum because it is not an action within the original jurisdiction of the district courts." *Frances J.*, 19 F.3d at 340. Similarly, under section 1441(c), the court found that the plain language of the statute created an insuperable barrier to removal. *See id.* at n.4. Because the Eleventh Amendment and the *Hans* doctrine barred some of the claims from any adjudication in federal court, the district court then could not determine "all issues therein." *Id.* (quoting 28 U.S.C. § 1441(c)).

The court below legitimately found in *Frances J.* a useful analogy to the case before it. In *Frances J.*, the Seventh Circuit ultimately held that the allegations barred by the Eleventh Amendment transformed that case into something other than "a civil action of which the district courts have original jurisdiction." *See* Pet. App. at 22a. Because that case could no longer be considered "a civil action," then neither the removal statutes nor the "arising under" statutes lawfully could extend federal jurisdiction over it. *Id.* at 21a-22a.

The College does not dispute the City's argument that the instant action in no way implicates Eleventh Amendment jurisprudence. *See* Pet. Br. at 41. Nor does the College need to defend the holding of *Frances J.* or to enter into the complexities of *Hans v. Louisiana* and its progeny. It is rather surprising that

the City and the National Trust *Amici* suggest that the Court use the instant appeal as an opportunity to review *Frances J.* when Eleventh Amendment issues are not before the Court. *See* Pet. Cert. Petition at 18; National Trust *Amici* Br. at 21. Nevertheless, with such emphasis on the holding of *Frances J.*, the City overlooks Judge Ripple's fundamental reasoning.

Frances J. is instructive because, like the instant appeal, it represents a situation where the nature of the action excluded the case from federal jurisdiction. In *Frances J.*, the allegations barred by the Eleventh Amendment precluded federal jurisdiction; here, the College's state-based claims for on-the-record administrative review cause the complaints to fall short of a civil action. Ultimately, of course, the *Frances J.* analogy does not obscure the clear holding of the Seventh Circuit: The College's Complaints for Administrative Review are not civil actions and are therefore not removable under federal question jurisdiction. That sound holding should be upheld.

III. IF REMOVAL WAS PROPER, THE ABSTENTION DOCTRINE REQUIRES THE COURT TO REMAND THE CASE TO THE CIRCUIT COURT OF COOK COUNTY.

Even if the Court concludes that federal courts have subject matter jurisdiction over state court appeals from state administrative agency decisions, abstention principles require federal courts to refrain from deciding such cases out of deference to "obligations of comity, and respect for the appropriate balance between state and federal interests." *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1729 (1996) (Kennedy, J., concurring). Although the balance between state and federal interests "only rarely favors abstention," *id.* at 1727, the extraordinary circumstances of this case clearly warrant application of the doctrine.[12]

[12] There is no doubt that this Court can—and should—decide these abstention questions if it concludes that the district court had subject matter jurisdiction. The College has argued throughout this case that the district court should have "abstained" from exercising its jurisdiction. The College first raised abstention in its motion to remand its Complaint for Administrative Review. *See* Pet. App. at 95a n.1. The district court disposed of the College's arguments in a footnote, stating that whether removal was proper was distinct from whether abstention would be appropriate and that the court would "decline[] to address the merits of abstention at this early juncture." *Id.* The College again raised abstention-based issues before the Seventh Circuit, arguing that the district court should have refused under 28 U.S.C. § 1367(c) to exercise supplemental jurisdiction over the College's state law claims. Section 1367(c) codifies abstention principles. *See White v. County of Newberry*, 985 F.2d 168, 173 (4th Cir. 1993) (holding that a district applying section 1367(c) "is invoking the abstention doctrine and must address federalism concerns about avoiding federal overreaching into highly specialized state enforcement or remedial schemes"); David Siegel, *The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, 28 U.S.C.A. § 1367 Practice Commentary at 834-35 (West 1993). The Seventh Circuit did not reach the College's section 1367(c) arguments. Nevertheless, the City recognizes that this case implicates abstention principles. *See* Pet. Br. at 44. Finally, even if this Court were to find that the College had not fully raised its abstention arguments below, it could consider the issue *sua sponte*. *See Bellotti v. Baird*, 428 U.S. 132, 143-44 n.10 (1976) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *England v. Medical Examiners*, 375 U.S. 411, 413 (1964); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500-01 (1941)).

The Court has long recognized several policy-based grounds for abstention, including:

> 1) to avoid unnecessarily deciding a federal constitutional question where the case may be disposed of by a state court interpretation of state law;
>
> 2) to leave to the state the resolution of unsettled questions of state law;
>
> 3) to show "regard for federal-state relations" or "wise judicial administration" and to avoid needless conflict with the administration by a state of its own affairs.

See id. at 1721, 1724; *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959). Each of these

well-settled grounds for abstention is manifest in the current case. Thus, even if the district court had subject matter jurisdiction, this case warrants remand[13] to the Circuit Court of Cook County under the doctrines announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).[14]

A. This Case Warrants *Burford* Abstention Because It Is Based On State Law Claims That Relate To A Complex State Regulatory Scheme And Implicate Local Policy Concerns Of Substantial Public Import.

The *Burford* abstention doctrine requires a federal court to abstain in cases involving "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'" or cases in which the exercise of federal review of the question in a case and in similar cases "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush*, 116 S. Ct. at 1726 (citations omitted). In *Burford*, the Court held that abstention was appropriate out of regard for the State of Texas' interest in controlling local oil drilling operations. *See Burford*, 319 U.S. at 334. In the current case, the City of Chicago's interest in

[13] The Court has held that a federal district court can remand a case to state court based on abstention principles. *See Quackenbush*, 116 S. Ct. at 1728 ("[F]ederal courts have the power to dismiss or remand cases based on abstention principles. . . .").

[14] Although this brief addresses the *Pullman* and *Burford* doctrines separately, it is important to note that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987). Thus, in addition to being proper under either *Pullman* or *Burford*, abstention in this case may also be appropriate—out of respect for principles of comity and federalism—under a combination of abstention doctrines.

controlling local land use and historical preservation is equally compelling.

Abstention is favored where a regulatory scheme requires administrative review actions to be commenced in a specific court. In *Burford*, the decisions of the Texas Railroad Commission were reviewable in the state district court in Travis County. *See id.* at 325. The Court recognized that concentration of review in one state court is designed to avoid the confusion and inconsistency that might result from review by several courts. *See id.* at 327. As the Court explained, "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review." *Id.* In *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), the Commission's order was to be appealed to the Circuit Court of Montgomery County, as expressly called for by statute, but Southern Railway brought the case in federal court. 341 U.S. at 348. The Court required abstention because, in part, the concentration of appeals in a single court provided adequate state court review. *See id.* at 347-49. Here, the Landmarks Ordinance directs administrative review to the Circuit Court of Cook County. *See* J.A. 173, 175-76, Municipal Code §§ 2-12-810, 2-120-860. Concentration of judicial review under the Landmarks Ordinance, as in *Burford*, enables the Circuit Court of Cook County to acquire a specialized knowledge useful in applying the important local policy concerns implicit in the Ordinance. Further, as in *Alabama Public Service Commission*, concentration of appeals provides adequate state court review. Thus, federal court intervention in administrative review cases brought under the Ordinance will lead to the delay and confusion this Court has previously sought to avoid. Abstention is appropriate for this reason alone.

In sanctioning abstention in *Burford*, the Court recognized that the "non-legal complexities" involved in the Texas regulatory scheme weighed in favor of abstention. 319 U.S. at 323. The Court also noted that balancing the public interest in resource conservation and the private interests in property rights added complexity to the case. *See id.* at 323-24 n. 16. Similarly, in

Alabama Public Service Commission, the Court ordered abstention where the federal court was asked to balance individual interests against predominantly local public interests. 341 U.S. at 347-48.

In the case at bar, application of the Landmarks Ordinance requires consideration of numerous individual interests, such as the economic impact of a landmark designation on a property owner. *See* J.A. 174, Municipal Code § 2-120-830. Against these individual interests, local policy considerations must be weighed, including the purported architectural uniqueness, historical significance, and the "distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the city of Chicago." J.A. 163, Municipal Code § 2-120-620. Further, the Landmarks Ordinance sets forth criteria to be applied by the Commission, defines the Commission's power to make an initial "preliminary designation" of a property as a landmark, provides for the enactment of a confirming "Designation Ordinance" by the City Council, permits public hearings before the Commission, and provides that all final decisions of the Commission shall be judicially reviewed in the Circuit Court of Cook County. *See* J.A. 160-176, Municipal Code §§ 2-120-610 *et seq.* The Ordinance thus clearly demonstrates the Chicago City Council's effort to establish a coherent policy regarding a matter of substantial public concern—preservation and development of Chicago's historical and architectural landmarks and districts.

The issues in this litigation are further complicated by the fact that the Landmarks Ordinance is only part of the City's land regulation scheme. In addition to the proceedings before the Landmarks Commission involving the College's demolition permit application and economic hardship application, the College also was required to apply for a permit under the Lakefront Protection Ordinance. *See* Pet. App. at 4a. Together these ordinances, along with the applicable provisions of the Chicago Zoning Ordinance, constitute a complex scheme designed to regulate land use, a matter of uniquely local concern.

The Court has emphasized that federal adjudication of "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors . . . would . . . disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989) ("*NOPSI*") (quoting *Alabama Pub. Serv. Comm'n*, 341 U.S. at 347). The current case directly presents these types of claims. The College alleged that the Landmarks Commission went beyond the purview of its statutory authority, that the Commission did not properly weigh the relevant factors set out in the Ordinance, and that the Commission's actions did not conform to the letter of state law. *See* Pet. App. at 46a-89a. To decide these questions would disrupt the Chicago City Council's attempt to regulate uniformly the uniquely local problems associated with development and preservation of Chicago's real estate.

Finally, when the issues in a case are predominantly local in nature, abstention is appropriate. *See Thibodaux*, 360 U.S. at 28; *Alabama Pub. Serv. Comm'n*, 341 U.S. at 347-48. The Court has expressed the view that matters of land use planning are primarily of local concern. *See Thibodaux*, 360 U.S. at 28 (stating that eminent domain concerns "turn on legislation with much local variation interpreted in local settings"). Indeed, lower federal courts have held that the uniquely localized nature of land use cases requires abstention. *See, e.g., Pomponio v. Fauquier County Bd.*, 21 F.3d 1319, 1326-27 (4th Cir. 1994), *cert. denied*, 513 U.S. 870 (1994); *Fields v. Rockdale County*, 785 F.2d 1558, 1561 (11th Cir.) ("The 'routine application of zoning regulations . . . is distinctly a feature of local government.'") (quoting *Hill v. City of El Paso*, 437 F.2d 352, 357 (5th Cir. 1971)), *cert. denied*, 479 U.S. 984 (1986); *Meredith v. Talbot County*, 828 F.2d 228, 232 (4th Cir. 1987) (ordering abstention because zoning was an important matter of state and local policy, the county's land use policies were governed by a complex regulatory scheme, and state court remedies were available); *Ad-Soil Servs., Inc. v. Board of County Comm'rs*, 596 F. Supp. 1139, 1143 (D. Md.

1984) (holding that *Burford* abstention applied because the matter was "clearly a local land use case"). In the land use case at bar, abstention is clearly appropriate.

Indeed, the local nature of the interests involved here contrasts sharply with the interests presented in *NOPSI*, where the Court held that abstention was not proper. In *NOPSI*, the Court reasoned that because wholesale electricity is not purchased and sold within a predominantly local market, a federal court did not need to be familiar with distinctively local regulatory facts or policies, and its intervention would not disrupt those policies. 491 U.S. at 363-64.[15] In the current case, the Landmarks Ordinance requires due consideration of uniquely local factors: Chicago's distinct architectural history, Chicago's interest in preserving that history, and the College's interests in developing its properties to enable it to further its beneficent goals. Because this case, unlike *NOPSI*, is so intertwined with local interests and local policies, abstention is required.

B. This Case Warrants *Pullman* Abstention Because It Presents Unsettled Questions Of State Law The Resolution Of Which Likely Will Eliminate The Federal Constitutional Questions.

The *Pullman* abstention doctrine recognizes that federal courts may be required to abstain in certain cases "'to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)); *see also Pullman*, 312 U.S. at 500-01. The Court has explained that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

[15] In *NOPSI*, the Court did not order abstention because state law claims were not involved. *See* 491 U.S. at 361.

In *Pullman*, the Court ordered abstention where the state-law question had not yet been addressed by the Texas Supreme Court and, therefore, the federal district court's interpretation would merely provide a "forecast rather than a determination" of the state-law issue. 312 U.S. at 499. The Court explained that state court interpretation of the state-law questions involved in that case could end the litigation and obviate the need for deciding the constitutional questions presented by the plaintiff. *See id.* at 501.

Pullman abstention is especially appropriate where, as here, the interrelationship between the challenged state law or local ordinance and the state constitution is unclear. *See Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975). In *Harris*, the Court explained that abstention is favored where "the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute." 420 U.S. at 84. Similarly, in *Reetz v. Bozanich*, 397 U.S. 82 (1970), the Court ordered abstention because resolution of state constitutional issues by an appropriate state court "could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.* at 86-87. Likewise, in *Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639 (1959) (per curiam), the Court ordered abstention where the plaintiff raised state and federal constitutional challenges to a state public utilities statute, explaining that "when the state court's interpretation of the statute *or evaluation of its validity under the state constitution* may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *Id.* at 640-41 (emphasis added).

Finally, in *Spector Motor Service*, the Court ordered abstention pending determination of state constitutional questions, explaining that the federal court was "without power" to decide state constitutional questions and that the federal court's "speculative" interpretations could be obviated or altered by state court resolution of the issues presented. 323 U.S. at 104-05; *see*

also Askew v. Hargrave, 401 U.S. 476, 477-78 (1971) (per curiam) (remanding for consideration of whether district court should have abstained pending resolution of state constitutional challenges to the statute in issue). These cases vividly demonstrate the propriety of abstention where resolution of state constitutional questions might obviate the need to address federal constitutional issues.

Applying this well-established precedent to the current case, it is clear that abstention is required. The College's first Complaint for Administrative Review alleged numerous violations of the Illinois Constitution. *See* J.A. 22-26, 33, Complaint ¶¶ 16(a)-(e), (g), (n). For example, the College challenged the Landmarks Ordinance on the basis that, in violation of the Illinois Constitution, it delegated legislative power to the Commission to designate landmark districts and to approve permits for construction or demolition of landmarked structures without providing legally sufficient criteria. *See* J.A. 23, Complaint ¶¶ 16(b), (c). Illinois courts have not resolved this or the other difficult Illinois constitutional issues raised by the College.

While this Court has indicated that federal courts need not abstain solely on the basis of unsettled state constitutional questions where the state constitutional provisions closely parallel provisions of the federal constitution, *see Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 598 (1975), the Court has "regularly" required abstention where the "challenged statute is part of an integrated scheme of related constitutional provisions, statutes and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts." *Harris*, 420 U.S. at 84 n.8. In this case, the College challenges the Landmarks Ordinance under Illinois constitutional provisions that effectively have no counterpart in federal constitutional law. *See, e.g.*, J.A. 23, Complaint ¶¶ 16(b), (c) (challenging the Landmarks Ordinance on the basis that it unconstitutionally delegates power without providing legally sufficient criteria for exercise of that power); J.A. 24, Complaint ¶ 16(e) (alleging violations of the

Illinois Constitution's takings clause). The Illinois takings clause and the nondelegation doctrine under the Illinois Constitution provide more protection than analogous provisions of the United States Constitution. *See Equity Assoc. v. Village of Northbrook*, 524 N.E.2d 1119, 1126 (Ill. App. Ct.) ("The guarantees of the Illinois Constitution that 'private property shall not be taken or damaged for public use without just compensation' is greater than the parallel guarantee provided under the . . . United States Constitution."), *appeal denied*, 530 N.E.2d 243 (Ill. 1988); *see also Dolan v. City of Tigard*, 512 U.S. 374, 389-90 (1994) (describing the "exacting scrutiny" required under the Illinois Constitution's takings clause, as opposed to its federal counterpart); *compare Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (finding no violation of federal nondelegation doctrine) *with City of Chicago v. Pennsylvania R.R. Co.*, 242 N.E.2d 152, 157 (Ill. 1968) (finding violation of Illinois nondelegation doctrine).

If this case is not remanded to the Circuit Court of Cook County, the Seventh Circuit will have to interpret the Landmarks Ordinance in light of the more protective constitutional standards of the Illinois Constitution. Indeed, the court will have to apply the Landmarks Ordinance and the Illinois Constitution's takings and nondelegation provisions, which together constitute an "integrated scheme" that "as a whole calls for clarifying interpretation in the state courts." *Harris*, 420 U.S. at 84 n.8.

Additionally, there is no doubt that resolution of the Illinois constitutional issues in the College's favor would obviate the need to decide federal constitutional questions. If the Circuit Court of Cook County were to hold that the Landmarks Ordinance violates the Illinois Constitution on its face[16] or as applied,[17] then "there [would be] an end of the litigation; the [federal] constitutional issue [would] not arise." *Pullman*, 312 U.S. at 501. Thus, *Pullman* abstention is required.

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[16] *See* J.A. 22-24, Complaint ¶¶ 16(a)-(d).

[17] *See* J.A. 24-26, 34, Complaint ¶¶ 16(e), (g), (r).

In addition to recognizing that cases presenting unsettled state constitutional questions are particularly appropriate for abstention, the Court has held repeatedly that the fact that a state statutory provision has not been construed by the state courts is a factor favoring abstention. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 511 (1972); *Albertson v. Millard*, 345 U.S. 242, 244-45 (1953); *Shipman v. DuPre*, 339 U.S. 321, 322 (1950); *Spector Motor Serv., 323 U.S.* at *104*.[18] In *Albertson*, the Court explained that "[i]nterpretation of state legislation is primarily the function of state authorities, judicial and administrative." 345 U.S. at 244.

The Landmarks Ordinance provisions at issue in the current case have never been authoritatively construed by Illinois courts. As in *Albertson*, interpretation of the difficult questions of state law raised by the College should be primarily the function of Illinois authorities. Thus, Illinois courts—not federal courts—should have the first word in interpreting and applying the Landmarks Ordinance. Without an authoritative interpretation by Illinois courts, the federal district court's decision can be nothing more than a "forecast" of state law. *See Pullman*, 312 U.S. at 499.

Finally, an initial state court interpretation of the Landmarks Ordinance in this case could substantially alter or render moot the federal constitutional questions. As three

[18] Of course, this factor is not in itself controlling where an unambiguous statute has been "regularly applied" by state trial courts over the course of several decades. *See City of Houston v. Hill*, 482 U.S. 451, 469-70 (1987) (refusing to require abstention where statute was unambiguous, had been in force for over 30 years, and had been interpreted numerous times by municipal courts, but not by state appellate courts). That is not the case here. The challenged provisions of the Landmarks Ordinance, which are far from unambiguous, have not been "regularly applied" by the Illinois courts. One clear example is that no Illinois decision addresses the College's first challenge to the Landmarks Ordinance: that section 2-120-630 unconstitutionally authorizes the Commission to designate private property as a landmark without prior notice or an opportunity to object. *See* J.A. 22-23, Complaint ¶ 16(a).

members of the Court stated in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985): "Where a state statute has never been construed or applied, it seems rather obvious that interpretations of the statute by a state court could substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution." *Id.* at 509 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring).

If this Court reverses the Seventh Circuit and decides that removal of the College's Complaints for Administrative Review was proper, the Court should hold that abstention is required in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit Court of Appeals remanding this case to the Circuit Court of Cook County should be affirmed.

Respectfully submitted,

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